

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

)	
UNITED STATES OF AMERICA,)	
Complainant,)	8 U.S.C. § 1324a Proceeding
)	
v.)	OCAHO Case No. 97A00068
)	
C. & Y. ENTERPRISES, INC.,)	
DBA: BELL 'AGIO RISTORANTE,)	Judge Robert L. Barton, Jr.
Respondent.)	
)	

**ORDER GRANTING COMPLAINANT'S MOTION
AND ENTERING DEFAULT JUDGMENT**

(May 15, 1997)

I. PROCEDURAL HISTORY

On April 1, 1996, following the service of a Notice of Intent to Fine (NIF), Respondent, by its Vice President Gerardo Cordiano, requested a hearing in this matter before an Administrative Law Judge. On February 7, 1997, the Complainant filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Attached to the Complaint was the NIF and the Request for Hearing.

The Complaint contains two counts which allege that Respondent knowingly hired an unauthorized alien and also failed to prepare an I-9 form for the individual. In the Prayer for Relief the Complaint seeks a civil money penalty of \$2,381 for the two violations.

On February 18, 1997, OCAHO mailed the Complaint, with the attachments, a Notice of Hearing, and a letter dated February 18, 1997, from Chief Administrative Hearing Officer (CAHO) Jack Perkins to Respondent's counsel Giacomo J. Behar, to both Respondent and Respondent's counsel. These were served on Respondent by first class mail and on Respondent's Counsel by certified mail, and the return receipt card from the U.S. Postal Service indicates that Respondent's counsel received his copy on February 20, 1997. The Notice of Hearing specifically stated that the Respondent must file an answer within thirty days after receipt of the Complaint and that failure to file an answer may be deemed to constitute a waiver of the right to appear and contest the allegations

of the Complaint. The Notice of Hearing further stated that if Respondent failed to file an answer to the complaint, the Administrative Law Judge may enter a judgment by default and grant all appropriate relief.

On April 21, 1997, Complainant served a motion requesting that I enter a default judgment because no answer to the complaint had been filed as required by 28 C.F.R. § 68.9(b). The motion was mailed to both the Respondent and Respondent's counsel. On April 22, 1997, I issued a Notice of Default which was served on Respondent by first class mail and on Respondent's counsel by both first class and certified mail. The postal return receipt card shows that Respondent's counsel received the Notice of Default on April 25, 1997. The Notice noted that no answer to the complaint had been received, that the Rules of Practice require such an answer, that Respondent was in default, and specifically warned that if an answer was not served, a default judgment might be entered. The Notice of Default instructed Respondent immediately to file an answer to the complaint and to show cause why a late filed answer should be accepted. Despite these warnings, to date Respondent has not filed an answer to the complaint or responded to the Complainant's Motion or to the Notice of Default.

II. DISCUSSION

With respect to the failure to file an answer to the complaint, as was explained in the Notice of Default, the Rules of Practice require a respondent to serve an answer to the complaint and provide that failure to do so shall constitute a default. 28 C.F.R. § 68.9. The Rules also provide that a party shall be deemed to have abandoned a request for hearing if the party or his representative fails to respond to orders issued by the Administrative Law Judge. 28 C.F.R. § 68.37(b). Failure to respond to a Notice of Default invites a judgment of default, especially where, as here, it appears that Respondent and his counsel have ignored the Court's order and de facto have abandoned the request for a hearing. See United States of America v. Broker's Furniture and Manufacturing, Inc., et. al., 5 OCAHO 789 (1995); United States v. Hosung Cleaning Corp., 4 OCAHO 681 (1994). Even in cases where they appeared without counsel, parties that failed to obey Judges' orders were found to have abandoned their requests for hearing or to have abandoned their complaints. United States v. Erlina Fashions, Inc., 4 OCAHO 656 (1994); Holquin v. Dona Ana Fashions, 4 OCAHO 605 (1994); Brooks v. Watts Window World, 3 OCAHO 570 (1993); Speakman v. Rehabilitation Hospital of South Texas, 3 OCAHO 476 (1993); Palancz v. Cedars Medical Center, 3 OCAHO 443 (1992).

Here, Respondent is represented by counsel, who, along with Respondent, has been served with the complaint, Complainant's motion for default, and the Notice of Default.¹ In the Notice of Hearing, counsel was advised that an answer to the complaint must be filed. The February 18, 1997 letter to Mr. Behar from the CAHO Jack Perkins, which was served with the notice of hearing and the complaint, and the Notice of Default, advised Mr. Behar that if he desired to withdraw from representation in this matter he must request permission from the Administrative Law Judge in the

¹ Mr. Behar filed a written notice of appearance on April 2, 1996.

form of a written motion. See 28 C.F.R. §§ 68.33(c), 68.6(a), and 68.11(a). To date, Respondent's counsel has neither filed a motion requesting to withdraw nor any other document indicating that he does not represent the Respondent. Since counsel has entered an appearance in this case, he is responsible to his client and the Court for filing an answer to the complaint, for responding to the opposing party's motion, and for complying with the Judge's orders. He has failed to do all three.

However, although Respondent's counsel has been remiss, Respondent also has not been diligent. Both the Complainant's motion for default judgment and the Court's Notice of Default were mailed directly to the Respondent, as well as Respondent's counsel, and thus Respondent either knew or should have known that its counsel had not filed an answer to the Complaint, that a motion for default judgment had been filed, and that a default judgment would be entered if an answer to the complaint was not filed.

Given the failure by Respondent and his counsel to answer the Complaint, or take any other action to defend Respondent's interests in this matter, I must conclude that Respondent has abandoned its Request for Hearing. Respondent is in default not only for failure to answer the Complaint, but also for failure to respond to the Notice of Default. See 28 C.F.R. §§ 68.9(b) and 68.37(b)(1).

III. FINDINGS, CONCLUSIONS AND ORDER

1. Complainant's Motion for Entry of a Default Judgment is granted;
2. I find that each and every paragraph of the Complaint, including the prayer for relief, has been admitted by Respondent by its failure to answer the Complaint;
3. Respondent shall pay a civil money penalty of \$2,381;
4. Respondent shall cease and desist from violating Sections 274A(a)(1)(A) and 274A(a)(2) of the Immigration and Nationality Act, 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2).
5. The notice of hearing in this case is canceled.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 1997, I have served the foregoing Order Granting Complainant's Motion and Entering Default Judgment on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Patricia A. Beattie, Esq.
Immigration and Naturalization Service
880 Front St., Site 1234
San Diego, CA 92101
(Counsel for Complainant)

Geradro Cordiano, Vice President
C. & Y. Enterprises, Inc.
d/b/a Bell 'Agio Ristorante
10492 Clairemont Mesa Blvd.
San Diego, CA 92124
(Respondent)

Giacomo J. Behar, Esq.
4660 La Jolla Village Dr.
Suite 475
San Diego, CA 92122
(Counsel for Respondent)
(by first class and certified mail)

Dea Carpenter
Associate General Counsel
Immigration and Naturalization Service
425 "I" Street, N.W., Room 6100
Washington, D.C. 20536-9999

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2510
Falls Church, VA 22041
(Hand Delivered)

Linda Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
Telephone No.: (703) 305-1739
FAX NO.: (703) 305-1515